SUPREME COURT, U.S.
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No. 94-1824

In The

Supreme Court of the United States

October Term, 1994

WALTER A. CONNOR, JR.,

Petitioner,

vs.

WESTERN PENNSYLVANIA TEAMSTERS AND EMPLOYERS PENSION FUND,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTION PRESENTED FOR REVIEW

Whether the Respondent's compliance with the Notice of Levy issued by the Internal Revenue Service, and the subsequent levy upon the Petitioner's pension benefits, resulted in a violation of the levy provisions of the Internal Revenue Code and the denial of due process to the Petitioner.

PARTIES TO THE PROCEEDING BELOW

Appellant/Cross Appellee in the United States Court of Appeals for the Third Circuit, and Petitioner herein, is Walter A. Connor, Jr., an individual.

Appellee/Cross Appellant in the United States Court of Appeals for the Third Circuit, and Respondent herein, is the Western Pennsylvania Teamsters and Employers Pension Fund, a jointly trusteed pension fund, administered pursuant to 29 U.S.C. §186(c)(5) by a Board of Trustees, consisting of five Trustees who are appointed by member Teamsters Local Unions located in the Western Pennsylvania and Northern Maryland areas, and five Trustees who are appointed by contributing employers to the Pension Fund.

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TO THE HONORABLE SUPREME COURT:

The Respondent, the Western Pennsylvania Teamsters and Employers Pension Fund, respectfully requests that the Court deny the Petition For Writ Of Certiorari ("Petition") submitted by the Petitioner, Walter A. Connor, Jr.

OPINIONS BELOW

The Order of the United States Court of Appeals for the Third Circuit, entered on February 3, 1995, denying Petitioner's Petition For Rehearing is unreported, and is reprinted at pages 8a-9a of the Appendix to the Petition.

The Judgment Order of the United States Court of Appeals for the Third Circuit, entered on November 7, 1994, affirming the District Court's Order is unreported, and is reprinted at pages 5a-7a of the Appendix to the Petition.

The Order of the United States District Court for the Western District of Pennsylvania, entered on December 23, 1993, adopting the Magistrate's Report And Recommendation is unreported, and is reprinted at pages 2a-4a of the Appendix to the Petition.

The Report And Recommendation of the United States Magistrate Judge, United States District Court for the Western District of Pennsylvania, entered on November 22, 1993, is unreported, and is reprinted at pages 11a-24a of the Supplemental Appendix to the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

STATUTES INVOLVED

In addition to the constitutional and statutory provisions cited by the Petitioner, the Respondent submits the following to the Court:

26 U.S.C. §6331 Levy And Distraint.

(a) Authority of Secretary. If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary to collect such tax (and such further sum as shall be sufficient to cover the expenses of the levy) by levy upon all property and rights to property (except such property as is exempt under section 6334) belonging to such person or on which there is a lien provided in this chapter for the payment of such tax. Levy may be made upon the accrued salary or wages of any officer, employee, or elected official, of the United States, the District of Columbia, or any agency or instrumentality of the United States or the District of Columbia, by serving a notice of levy on the employer (as defined in section 3401(d)) of such officer, employee, or elected official. If the Secretary makes a finding that the collection of such tax is in jeopardy, notice and demand for immediate payment of such tax may be made by the Secretary and, upon failure or refusal to pay such tax, collection thereof by levy shall be lawful without regard to the 10-day period provided in this section.

(b) Seizure and sale of property. The term "levy" as used in this title includes the power of distraint and seizure by any means. Except as otherwise provided in subsection (e), a levy shall extend only to property possessed and

obligations existing at the time thereof. In any case in which the Secretary may levy upon property or rights to property, he may seize and sell such property or rights to property (whether real or personal, tangible or intangible). . . .

26 U.S.C. §6332 Surrender Of Property Subject To Levy.

(a) Requirement. Except as otherwise provided in this section, any person in possession of (or obligated with respect to) property or rights to property subject to levy upon which a levy has been made shall, upon demand of the Secretary, surrender such property or rights (or discharge such obligation) to the Secretary, except such part of the property or rights as is, at the time of such demand, subject to an attachment or execution under any judicial process.

* * *

(d) Enforcement of Levy. (1) Extent of personal liability. Any person who fails or refuses to surrender any property or rights to property, subject to levy, upon demand by the Secretary, shall be liable in his own person and estate to the United States in a sum equal to the value of the property or rights not so surrendered, but not exceeding the amount of taxes for the collection of which such levy has been made, together with costs and interest on such sum at the underpayment rate established under section 6621 from the date of such levy (or, in the case of a levy described in section 6331(d)(3), from the date such person would otherwise have been obligated to pay over such amounts to the taxpayer).

Any amount (other than costs) recovered under this paragraph shall be credited against the tax liability for the collection of which such levy was made.

(2) Penalty for violation. In addition to the personal liability imposed by paragraph (1), if any person required to surrender property or rights to property fails or refuses to surrender such property or rights to property without reasonable cause, such person shall be liable for a penalty equal to 50 percent of the amount recoverable under paragraph (1). No part of such penalty shall be credited against the tax liability for the collection of which such levy was made.

(e) Effect of honoring levy. Any person in possession of (or obligated with respect to) property or rights to property subject to levy upon which a levy has been made who, upon demand by the Secretary, surrenders such property or rights to property (or discharges such obligation) to the Secretary (or who pays a liability under subsection (d)(1)) shall be discharged from any obligation or liability to the delinquent taxpayer and any other person with respect to such property or rights to property arising from such surrender or payment.

(f) Person defined. The term "person," as used in subsection (a), includes an officer or employee of a corporation or a member or employee of a partnership, who as such officer, employee, or member is under a duty to surrender the property or rights to property, or to discharge the obligation.

COUNTERSTATEMENT OF THE CASE

The Petitioner, Walter A. Connor, Jr., was an active participant with the Respondent, the Western Pennsylvania Teamsters and Employers Pension Fund ("Pension Fund"), for 28 years, retired effective June 1, 1992, and received the monthly pension benefit of $865.03. The Pension Fund is a jointly trusteed multiemployer pension fund, whose operation is governed by various federal laws, particularly the Employee Retirement Income Security Act of 1974, as amended ("ERISA") (29 U.S.C. §1001, *et seq.*) (S.App. 13a).

On March 3, 1993, the Pension Fund Office received from the Internal Revenue Service ("IRS") a letter and an attached Notice Of Levy On Wages, Salary, And Other Income ("Notice of Levy"), both dated February 8, 1993. The letter stated that the Petitioner was not entitled to any exemptions under Section 6334(a)(9) of the Internal Revenue Code ("Code") (26 U.S.C. §6334(a)(9)), and that the Pension Fund was required to pay the Petitioner's monthly pension benefit of $865.03 directly to the IRS, effective with the payment commencing on April 1, 1993, until the assessment of $119,739.11 was satisfied. The Pension Fund's Board of Trustees ("Trustees"), at a meeting on March 4, 1993, directed the Pension Fund Office to comply with the Notice of Levy starting with the monthly payment effective April 1, 1993 (S.App. 13a-14a).

The Petitioner objected to the Trustees' decision and requested an appeal of the decision. An appeal hearing was held on March 25, 1993, and the Petitioner was permitted to present testimony, and submit documents, to a Panel of Trustees. Upon consideration of the Panel's

recommendations, the Trustees denied the appeal at a meeting on April 8, 1993. As the result, with the pension benefit payment on April 1, 1993, and each month thereafter, the Petitioner's pension benefit of $865.03 has been paid directly to the IRS (S.App. 16a-17a).

On August 9, 1993, the Petitioner commenced an action against the Pension Fund in the Court of Common Pleas of Allegheny County, Pennsylvania. On September 2, 1993, the Pension Fund removed the proceeding to the United States District Court for the Western District of Pennsylvania.

On November 22, 1993, the United States Magistrate Judge entered the Report And Recommendation ("Report") recommending that: (1) the Pension Fund's Cross Motion For Summary Judgment be granted and the proceeding be dismissed; and (2) the Pension Fund's request for reasonable attorneys' fees and costs be denied (S.App. 11a). The District Court, by Order entered on December 23, 1993, adopted the Report and dismissed the proceeding (App. 2a).

The Petitioner subsequently filed an appeal (Docket No. 94-3023) with the United States Court of Appeals for the Third Circuit requesting the reversal of the District Court's Order. The Pension Fund filed a cross appeal (Docket No. 94-3024) from the failure of the District Court's Order to grant the Pension Fund's request for reasonable attorneys' fees and costs. By Judgment Order, entered on November 7, 1994, the Court of Appeals affirmed the District Court's Order (App. 5a). The Court of Appeals subsequently denied Petitioner's Petition For

Rehearing by Order, entered on February 3, 1995 (App. 8a).

SUMMARY OF THE ARGUMENT

The Court of Appeals did not commit error in affirming the District Court's adoption of the Magistrate's Report And Recommendation, which found that the Pension Fund's compliance with the Notice of Levy issued by the Internal Revenue Service was reasonable and was mandated by Section 6332(a) of the Internal Revenue Code. The failure to comply with the Notice of Levy would have subjected the Pension Fund to the payment of a 50% penalty pursuant to Section 6332(d) of the Internal Revenue Code, and would have resulted in the wasting of the Pension Fund's assets by the payment of the penalty. By complying with the Notice of Levy and the pertinent provisions of the Internal Revenue Code, the Pension Fund is immune and indemnified against any objections raised by the Petitioner. The arguments raised by the Petitioner objecting to the Pension Fund's compliance with the Notice of Levy have been consistently held to be meritless by the courts. Thus, the decision of the court below is fully consistent with established federal law and further review is not warranted.

ARGUMENT FOR DENIAL OF THE WRIT

I. THE COURT BELOW CORRECTLY FOUND THAT THE UTILIZATION OF THE NOTICE OF LEVY BY THE INTERNAL REVENUE SERVICE TO LEVY UPON THE PETITIONER'S PENSION BENEFITS DID NOT VIOLATE DUE PROCESS AND FURTHER REVIEW IS NOT WARRANTED

The Petitioner's primary argument in the Petition is that the Notice of Levy was improper and a violation of due process, because it was not accompanied by a notice of distraint or seizure, and the Pension Fund was required to inquire into the IRS procedures resulting in the Notice of Levy. The Magistrate's Report thoroughly reviewed the precedents and the pertinent provisions of the Code, and rejected this argument, finding that

> *[t]he tax levy procedure which permits the IRS to levy on property does not violate due process. Christensen v. U.S.*, 733 F.Supp. 844, 853-54 (D.N.J. 1990), *aff'd*, 925 F.2d 416 (3d Cir. 1991). Further, the IRS may levy under §6331 of the Internal Revenue Code without a judgment in a court of competent jurisdiction. *Id.* at 850. Thus, the Pension Fund was not required to obtain a court order before complying with the instant Notice of Levy, and there is no evidence which shows that said Notice was improper.
>
> (S.App. 17a-18a) (Emphasis added)

The Petitioner's contention that the Notice of Levy, without a warrant of distraint or seizure, is not a levy, has no merit. The power of levy includes the power of distraint and seizure by any means, and the IRS is not required to issue a warrant of distraint to make a levy

effective. It is sufficient, as in this proceeding, that a Notice of Levy is served on the custodian holding the funds of a delinquent taxpayer to make the levy effective. *See Schiff v. Simon & Schuster, Inc.*, 780 F.2d 210, 212 (2nd Cir. 1985); *Rosenblum v. United States*, 300 F.2d 843, 845 (1st Cir. 1962); *United States v. Manufacturers National Bank*, 198 F.Supp. 157, 158-59 (N.D. N.Y. 1961). Thus, as correctly noted in the Report, "[a] levy is effective upon the IRS' service of the notice of levy", citing *Resolution Trust Corporation v. Gill*, 960 F.2d 336, 340 (3d Cir. 1992) (S.App. 17a).

The Petitioner's argument also fails to acknowledge that the use of a Notice of Levy form to levy upon property is expressly provided by the Treasury Regulations. Moreover, the case law has, without exception, supported the use of a Notice of Levy form to levy a taxpayer's property. *See, e.g., United States v. National Bank of Commerce*, 472 U.S. 713, 720, 105 S.Ct. 2919, 2924 (1985); *Phelps v. United States*, 421 U.S. 330, 335, 95 S.Ct. 1728, 1732 (1975); *St. Louis Union Trust Co. v. United States*, 617 F.2d 1293, 1302 (8th Cir. 1980).

Lastly, the Petitioner could have contested the validity of the levy and the Notice of Levy, by filing a claim for refund with the IRS, pursuant to Section 7422 of the Code (26 U.S.C. §7422), but did not. *See Johnson v. United States*, 566 F.Supp. 1012, 1014 (M.D. Fla. 1983); *Sunderlin v. Oneida National Bank of Utica*, No. 77-CV-320, 1978 WL 4491, 78-2 USTC ¶9486 (N.D. N.Y. May 24, 1978).

The finding by the Magistrate, as adopted by the District Court and affirmed by the Court of Appeals, that the issuance of the Notice of Levy and the levy of the

Petitioner's pension benefits did not violate due process, is fully consistent with precedent, comports with the pertinent provisions of the Code and, therefore, no further review is warranted.

II. THE COURT BELOW CORRECTLY FOUND THAT THE PENSION FUND WAS REQUIRED TO COMPLY WITH THE NOTICE OF LEVY AND WAS IMMUNE FROM LIABILITY FOR COMPLYING WITH THE NOTICE OF LEVY AND FURTHER REVIEW IS NOT WARRANTED

A. The Pension Fund Was Required To Comply With The Notice Of Levy Or It Would Have Been Subjected To Personal Liability

The Petitioner argues in the Petition that the Pension Fund, by complying with the Notice of Levy, failed to follow the levy and seizure procedures of the Code resulting in an unlawful conversion of his property (pension benefits) and the denial of due process. The Magistrate's Report correctly rejected this argument by finding that " . . . the Pension Fund was required to surrender the plaintiff's monthly benefits to the IRS upon receiving the Notice of Levy." (S.App. 19a) The Report also noted that

> [h]ad the Pension Fund not complied with the IRS' Notice of Levy, it would have incurred personal liability pursuant to section 6332(d) of the Internal Revenue Code, 26 U.S.C. §6332(d). . . .
>
> (S.App. 19a)

The Report further concluded that

> . . . the plaintiff's argument that the Pension Fund unlawfully converted his property is without merit.
>
> (S.App. 20a)

Section 6332(a)[1] of the Code (26 U.S.C. §6332(a)), provides for an IRS levy upon property of a delinquent taxpayer.

> . . . [A]ny person in possession of (or obligated with respect to) property or rights to property subject to levy upon which a levy has been made shall, upon demand of the Secretary, surrender such property or rights (or discharge such obligation) to the Secretary, *except such part of the property or rights as is, at the time of such demand, subject to an attachment or execution under any judicial process.*
>
> (Emphasis added)

Section 6332(a) provides only two circumstances that would have justified the Pension Fund's non-compliance with the Notice of Levy: the Pension Fund was either not

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[1] A "person for the purpose of Section 6332 of the Code is defined at Section 6332(f), as follows:

> The term "person" . . . includes an officer or employee of a corporation or a member or employee of a partnership, who as such officer, employee, or member is under a duty to surrender the property or rights to property, or to discharge the obligation.

A number of courts have held that trustees of employee benefit plans subject to ERISA are "persons" within the meaning of Section 6332(f). *See, e.g., Carman v. Parsons*, 789 F.2d 1532, 1534 (11th Cir. 1986); *Johnson v. United States*, 566 F.Supp. 1012, 1014 (M.D. Fla. 1983).

"in possession of" or "obligated with respect to" the Petitioner's pension benefits, or the Petitioner's pension benefits were subject to a prior judicial attachment or execution. *See United States v. National Bank of Commerce*, 472 U.S. 713, 721-22, 105 S.Ct. 2919, 2925 (1985); *United States v. Sterling National Bank & Trust Co.*, 494 F.2d 919 (2nd Cir. 1974).

However, neither of the circumstances provided in Section 6332(a) existed and, therefore, the Pension Fund was not required to investigate the validity of the Notice of Levy or determine whether the IRS properly followed its own procedures in issuing and serving the Notice of Levy. *United States v. Metro Interior, Inc.*, No. 90-0889-CV-W-1, 1992 WL 464226, 93-1 USTC ¶50,073 (W.D. Mo. October 5, 1992). Moreover, the fact that the Petitioner disputed the issuance or enforcement of the Notice of Levy by the IRS was not a circumstance under Section 6332(a) that would have justified non-compliance with the Notice of Levy. *See Schiff v. Simon & Schuster, Inc.*, 780 F.2d 210, 212 (2nd Cir. 1985); *United States v. Augspurger*, 508 F.Supp. 327, 328-29 (W.D. N.Y. 1981).

Lastly, as the Report noted (S.App. 19a-20a), the failure to comply with the Notice of Levy would have subjected the Pension Fund to personal liability and the payment of a 50% penalty pursuant to Section 6332(d), as follows:

> (1) . . . Any person who fails or refuses to surrender any property or rights to property, subject to levy, upon demand by the Secretary, shall be liable in his own person and estate to the United States in a sum equal to the value of the property or rights not so surrendered. . . .

> (2) . . . In addition to the personal liability imposed . . . if any person required to surrender property or rights to property fails or refuses to surrender such property or rights to property without reasonable cause, *such person shall be liable for a penalty equal to 50 percent of the amount recoverable.* . . .
>
> (Emphasis added)

The payment of the 50% penalty would have resulted in the wasting of the Pension Fund assets, and subjected the Trustees to a violation of the "prudent man" fiduciary standard of ERISA. *See* 29 U.S.C. §1104(a); *Donovan v. Estate of Fitzsimmons*, 778 F.2d 298, 302 (7th Cir. 1985), *on reh. en banc*, 805 F.2d 682 (7th Cir. 1986) ("The fiduciary standards 'must be enforced with uncompromising rigidity' ".).

The Magistrate correctly determined that the Pension Fund was required to comply with the provisions of the Notice of Levy, and the District Court and the Court of Appeals did not commit error by affirming the Magistrate's finding.

B. The Pension Fund Was Immune From Liability For Complying With The Notice Of Levy

The Report, citing Section 6332(e) of the Code (26 U.S.C. §6332(e)), correctly found that " . . . it is clear that the Pension Fund is exempt from liability as to the plaintiff for complying with the Notice of Levy." (S.App. 20a) Section 6332(e) provides, as follows:

> Any person in possession of (or obligated with respect to) property or rights to property subject

> to levy upon which a levy has been made who, upon demand by the Secretary, surrenders such property or rights to property (or discharges such obligation) to the Secretary (or who pays a liability under subsection (d)(1)) *shall be discharged from any obligation or liability to the delinquent taxpayer and any other person with respect to such property or rights to property arising from such surrender or payment.*
>
> (Emphasis added)

See also Treasury Regulation 301.6332-1(c)(1).

The law is well-settled that compliance with an IRS levy is a complete defense against any action brought by the taxpayer. *See, e.g., Farr v. United States*, 990 F.2d 451, 456 (9th Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S.Ct. 634 (1993) (" . . . the party in possession [of property levied] has limited defenses to a levy on a taxpayer's property interest and will proceed at his own peril if he refuses to honor the levy."); *Burroughs v. Wallingford*, 780 F.2d 502, 503 (5th Cir. 1986); *Schiff v. Simon & Schuster, Inc.*, 780 F.2d 210, 212 (2nd Cir. 1985); *United States v. Weintraub*, 613 F.2d 612, 621 n.33 (6th Cir. 1979), *cert. denied*, 447 U.S. 905, 100 S.Ct. 2987 (1980); *Johnson v. United States*, 566 F.Supp. 1012, 1014 (M.D. Fla. 1983); *Forster v. United States*, No. B-82-1029-CA, 1983 WL 1701, 84-1 USTC ¶9124 (E.D. Tx. October 9, 1983); *Sunderlin v. Oneida National Bank of Utica*, No. 77-CV-320, 1978 WL 4491, 78-2 USTC ¶9486 (N.D. N.Y. May 24, 1978); *DiEdwardo v. First National Bank of Bath*, 442 F.Supp. 499, 500 (E.D. Pa. 1977).

The Magistrate correctly found that by honoring the provisions of the Notice of Levy requiring the payment of the Petitioner's monthly pension benefit to the IRS, the

Pension Fund complied with federal law and is immune from liability to the Petitioner. Neither the District Court nor the Court of Appeals committed error by adopting and affirming this finding by the Magistrate.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition For Writ Of Certiorari be denied in its entirety.

Respectfully submitted,

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